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MICHAEL RODAK, JR., CLE

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-1562

LT. FREDERICK JONES

Petitioner,

vs.

UNITED STATES OF AMERICA;
WILLIAM SAXBE, United States Attorney General; and
DAVID V. SEAMAN, Secretary of the Air Force

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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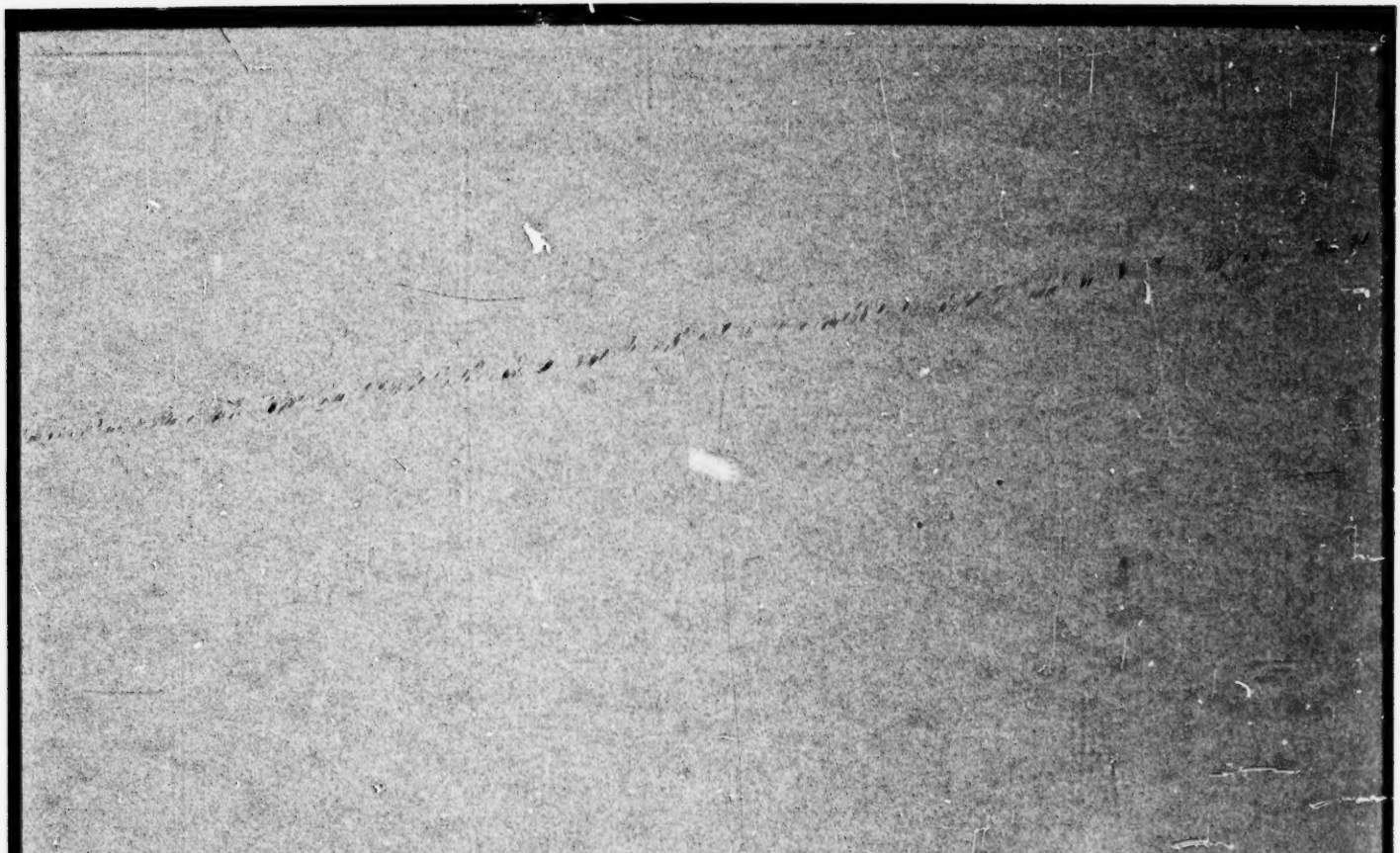

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No.

LT. FREDERICK JONES,

Petitioner,

v.

UNITED STATES OF AMERICA; WILLIAM SAXBE, United States Attorney General; and DAVID V. SEAMAN, Secretary of the Air Force,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, LT. FREDERICK JONES, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Military Review, entered on March 6, 1973, such opinion being denied review by the United States

District Court, District of Arizona, on August 22, 1973, and by the United States Court of Appeals for the Ninth Circuit on February 25, 1974.

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OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit appears at Appendix A, infra, on page 19 . The Order of the United States District Court, District of Arizona, is unreported and appears at Appendix B, infra, on page 20 . The findings of the United States Court of Military Review is unreported and appears at Appendix C, infra, on page 21 .

JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit was entered on February 25, 1974. See Appendix A, infra, page 19 . This Petition for a Writ of Certiorari was filed within the time prescribed by law within ninety (90) Days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257 (1).

QUESTIONS PRESENTED

Is habeas corpus relief available to a military man under 28 U.S.C.A. Section 2241 When such military man raises several constitutional contentions as to the validity of his Court Martial Hearing, and, pursuant to such Court Martial, is fined a sum of money, such sum remaining unpaid at the time the Petition For A Writ Of Habeas Corpus is filed?

CONSTITUTIONAL PROVISION INVOLVED

Amendment V to the Constitution of the United States:

> "No person shall ... be deprived of life, liberty, or property, without due process of law;"

STATEMENT OF FACTS

Petitioner is in the military service at Davis-Monthan Air Force Base, Tucson, Arizona, and was found guilty of violating Article 92 of the Uniform Code of Military Justice by the Department of the Air Force,

Headquarters, Second Air Force, (SAC) Barksdale Air Force Base, Louisiana 81110. The specific charge was failure to monitor duty. (See Appendix A, Page 19, infra)

Petitioner, as punishment, received a reprimand and was fined Two Hundred Fifty and no/100 ($250.00) Dollars per month for six months by means of having such amount forfeited from his pay check.

Petitioner appealed the judgment through military channels, contending that Article 92 of the Uniform Code of Military Justice was unconstitutional in that it was vague and ambiguous.

After unsuccessfully prosecuting this contention within military channels, Petitioner sought a Writ of Habeas Corpus to the United States District Court, District of Arizona, in order that his contention could be heard by a civilian court since constitutional questions were involved.

Petitioner was denied his day in court, however, since the United States District Court Judge felt that there was no jurisdiction in that Appellant was not in custody, as required by 28 U.S.C.A. Section 2241. (See Appendix B, page 20, infra)

On appeal to the United States Court of Appeals for the Ninth Circuit, Petitioner was again denied his day in court in that the judges felt that there was no basis for jurisdiction because Petitioner was not in custody as required by 28 U.S.C.A. Section 2241. (See Appendix A, page 19, infra)

RAISING OF FEDERAL QUESTION

Counsel for Petitioner argued a Motion to Suppress certain evidence, such Motion being heard at the Court Martial Trial on November 6, 1972, and such motion being denied by the military tribunal the same day. Petitioner was found guilty of violating

Article 92 of the Uniform Code of Military Justice by the Military Court at Davis-Monthan Air Force Base, Tucson, Arizona, on November 8, 1972, and such conviction was affirmed by the United States Court of Military Review on March 6, 1973.

REASONS FOR GRANTING THE WRIT

1. Petitioner should be deemed to be in custody for purposes of 28 U.S.C.A. Section 2241.

The District Court Judge (The Ninth Curcuit refusing to take jurisdiction on appeal) appeared to base his ruling against the Petitioner upon the notion that, since there was no possibility of incarceration concerning the Petitioner, in that there was no way in which Petitioner could fail to pay his fine (Petitioner received a forfeiture rather than a fine), he could not be considered to be in "custody" for purposes of the Habeas Corpus statute, the judge

citing the case of Westberry vs. Keith, 434 F.2d 23 (U.S.C.A., 5th Cir. 1970).

In Westberry the Appellant had had her drivers license revoked for one year and had been fined Two Hundred Fifty and no/100 ($250.00) Dollars for failure to yield the right of way. Her fine being paid at the time she sought a Writ of Habeas Corpus, the Fifth Circuit denied jurisdiction because Appellant was not in "custody" pursuant to the judgment of the state court as required by the habeas corpus statute. Although the Court ruled that one year's loss of driving privilege would not constitute being in "custody" within the habeas corpus statute, the Court did recognize that the concept of habeas corpus had, within recent years, been expanded to the extent that it was no longer necessary for a person to be under

actual pnysical restraint in order to obtain the habeas corpus relief.

Petitioner submits that the above case can be distinguished from the one at bar and does not adequately reflect modern legal thought as to the concept of "custody" as the term used in 28 U.S.C.A. Section 2241.

In Westberry, the fine had already been paid, as we have seen, at the time the Writ of Habeas Corpus was filed. In the instant case, Petitioner's "fine" still remained to be paid at the time of filing the writ. Petitioner submits that this is an important distinction regarding the issue as to whether a possibility of incarceration exists or existed.

The United States, in its briefs below, used the companion cases of Hooper vs. Hartman, 274 F.2d 429, and Hooper vs. The United States, 326 F.2d 982, for alleging

that Petitioner was not in "custody" for purposes of habeas corpus. These two cases delt with whether a retired Naval officer could have his retirement pay reinstated after it was taken away from him pursuant to a Court Martial conviction on moral charges (Hooper's Court Martial proceedings took place while he was in retirement). The first case merely held, per curiam, that a forfeiture of retirement pay (a benefit) did not place Hooper within sufficient "custody" for purposes of habeas corpus. The second case went off on other issues, i.e., as to whether the initial Court Martial proceeding against Hooper was constitutional.

The Hooper cases are also distinguishable in that there was no mention of the forfeiture being a fine as such, Hooper's retirement benefit being forfeited. There-

fore, there was no possibility that Hooper could be incarcerated because there was no legal obligation to pay any sum of money. But in the instant case, Petitioner received a fine, payable by means of forfeiture. Thus, a fortiori, Petitioner remained under a legal obligation to pay money.

Petitioner urges the Court to apply the concept of custody and thus give relief to those with justiciable cases or controversies dealing with constitutional questions, to those who have been fined pursuant to a judicial order when such fine remains unpaid at the time the petition for habeas corpus relief is filed.

In the usual case, if a fine is not paid when ordered by the Court and the person is subject to pay the fine is found financially able to pay it, such person will be held in civil contempt and will be

so held until such fine is paid. Thus, in this situation, the possibility of incarceration does exist.

It has been generally held that, regarding custody, the situation of the Petitioner is to be judged at the time of filing the petition. Yacobellis vs. Mc Kendrick, 332 F.Supp. 1216 (1971); Choung vs. Misterly, 456 F.2d 176 (U.S.C.A., 9th Cir. 1972).

And, indeed, Courts have held that jurisdiction was proper in some instances where the Petitioners have not been in any form of custody at all.

Consider the following:

In Morgan vs. Thomas, 321 F.Supp. 565 (1970), reversed, 448 F.2d 1356, cert. denied 405 U.S. 920, 92 S.Ct. 948, 30 L.Ed. 2d 790, Petitioner, Morgan, was a contractor that had signed a partnership agreement

with one Hyde to obtain payment and performance bonds for additional construction contracts that he desires. The agreement covered things of this nature, Petitioner to receive commissions for signing the applications for the bond as indemnitor. A copy of the agreements were sent to a guaranty company which had executed payment and performance bonds for and on behalf of Hyde, and, thereafter, the guaranty company executed additional payment and performance bonds for Petitioner and Hyde, totaling several millions of dollars. Petitioner signed both of these individually, as co-partner, and as indemnitor where the jobs were negotiated. Pursuant to these agreements of indemnity, the guaranty company bound itself as surety on at least twelve different "construction bonds." The principal on many surety bonds defaulted, the

guaranty company looking to Petitioner and Hyde for indemnity. As the result of both Petitioner and Hyde failing to indemnify, the guaranty company had judgments rendered against it which it had to subsequently pay. Petitioner is both the principal and indemnitor on all of these bonds. Petitioner was sued for specific performance, among other things. A mandatory injunction was issued compelling Petitioner to issue to the guaranty company a financial statement. Petitioner refused, alleging that if he so issued it, he would be depriving himself of his constitutional rights guaranteed by the Fifth Amendment. Petitioner, before being arrested or formally served with a copy of the decree adjudging him to be in civil contempt, filed his petition for a Writ of Habeas Corpus, and served it upon the Sheriff at the time the Sheriff served the contempt order upon him. The

Court held Petitioner to be in "custody" at the time he filed his petition and had granted Petitioner jurisdiction.

And, in Glover vs. North Carolina, 301 F.Supp. 364 (1969), the Court ruled that habeas corpus was available to one convicted and at the time serving concurrent sentences for seven felonies, even though he had already served his time for the crimes in which habeas corpus relief was sought, thus, in effect, Glover not being in custody for those particular crimes.

> "Although petitioner did not file his application while he was serving the sentence which he attacks, he nonetheless will suffer disabilities and restraints on his liberty as a result of his having been convicted of seven felonies ... ."
> ....
> "It is not actual physical custody during the serving of a sentence that gives standing in habeas corpus, it is instead the restraint on liberty, whether physical or of a more subtle nature."

The latest Supreme Court case that deals with the concept of "custody" regarding a petition for Writ of Habeas Corpus is Hensley vs. Municipal Court, No. 71-1428 (April 18, 1973). This case was from the Ninth Circuit, being reversed by the United States Supreme Court. Upon holding that a person released on his own recognizance is in "custody" within the meaning of 28 U.S.C.A. Section 2241, the Court noted that ". . .[H]abeas corpus is 'not a static, narrow, formalistic remedy,' but one which one must retain the 'ability to cut through barriers of form and procedural mazes' [Cites]. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected [Cite]."

The Court cited two criteria to use

for standards for holding the way they did. First, the Court said the Petitioner was subject to restraints ". . .[N]ot shared by the public generally. . ." (i.e., that Petitioner had the obligation to appear ". . . [A]t all times and places as ordered" by ". . .[A]ny court or magistrate of competent jurisdiction.

Second, the Court noted that Petitioner remained at large only by the grace of the Court by means of a stay entered.

CONCLUSION

Petitioner submits that his case falls within the letter and spirit of the above-cited cases, and, therefore, Petitioner submits that jurisdiction should be granted to him because there is indeed a possibility of incarceration; and, therefore, Petitioner is in custody as required by the habeas corpus statute.

It would be untenable to take the same

type of punishment, label it a certain way, and thereby deny one the right to have his constitutional contentions heard simply because by labeling it one way there would be no possibility of incarceration, being that money is forfeited before one receives it, rather than being paid after one receives it. The substance of the punishment remains the same in that the Two Hundred Fifty and no/100 ($250.00) Dollars per month is lost from his wages until the fine is paid.

For the above reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Military Review as denied review by the United States District, District of Arizona, Tucson, Arizona, and by the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

SCHROEDER, SOELTER & ROSENTHAL, P.C.
940 South Craycroft Road
Tucson, Arizona 85711

BY
LARRY S. ROSENTHAL
Counsel for Petitioner

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LT. FREDERICK JONES, *Appellant,* vs. THE UNITED STATES OF AMERICA; ROBERT BORK, Acting United States Attorney General; and DAVID V. SEAMAN, Secretary of the Air Force, *Appellees.*	No. 73-3071 MEMORANDUM

[February 25, 1974]

Appeal from the United States District Court
for the District of Arizona

Before: MERRILL, DUNIWAY, and HUFSTEDLER, Circuit Judges.

The custody requirement for federal habeas corpus relief has not been so far expanded as to encompass the fine imposed upon appellant. No provision of the sentence permits incarceration for nonpayment of the fine. The district court correctly dismissed the petition for lack of federal jurisdiction. We permit the filing of appellant's addendum to his brief, but we are unconvinced that declaratory relief is appropriate on this record.

AFFIRMED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-27-74—480

FILED

APPENDIX C

OCT 23 1973

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By: LARRY S. ROSENTHAL
Attorneys for

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

LT. FREDERICK JONES,

Petitioner,

vs.

THE UNITED STATES OF AMERICA; ELLIOT RICHARDSON, the United States Attorney General; and DAVID V. SEAMAN, Secretary of the Air Force,

Respondents.

CIV 73-109-TUC

ORDER FOR JUDGMENT NUNC PRO TUNC

IT IS HEREBY ORDERED that the order rendered by this Court dismissing Petitioner's Petition for Writ of Habeas Corpus, for lack of jurisdiction on the 22nd day of August, 1973, be entered as of October 16, 1973, nunc pro tunc.

DATED this 23 day of October, 1973.

THE HONORABLE DAVID W. WILLIAMS, UNITED STATES DISTRICT JUDGE, U. S. DISTRICT COURT, District of Arizona

APPENDIX "C"

ooOoo

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS SECOND AIR FORCE (SAC)
Barksdale Air Force Base, Louisiana 71110

General Court-Martial Order 6 March 1973
No. 14

Before a general court-martial which convened at Davis-Monthan Air Force Base, Arizona, pursuant to Special Order A-95, this headquarters, dated 27 July 1972, as amended by Special Order A-104, this headquarters, dated 10 August 1972, as amended by Special Order A-119, this headquarters, dated 24 October 1972, was arraigned and tried:

SECOND LIEUTENANT FREDERIC D. JONES, 252-74-2958, United States Air Force, 570 Strategic Missile Squadron.

CHARGE I: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that SECOND LIEUTENANT FREDERIC D. JONES, United States Air Force, 570 Strategic Missile Squadron, while on duty as the Deputy Missile Combat Crew Commander in the Launch Control Center of Missile Complex 570-7, near Tucson, Arizona, did on or about 16 February 1972 violate a lawful general regulation, to wit: paragraph 2-3a, Volune IV, Strategic Air Command Manual 122-2, dated 12 October 1971, by failing to monitor the status panels at all times in order to detect and counteract any attempt to tamper with the re-entry vehicle or other critical components.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that SECOND LIEUTENANT FREDERIC D. JONES, United States Air Force, 570 Strategic Missile Squadron, did, at Missile Complex 570-7 near Tucson, Arizona, while on alert status as Deputy Missile Combat Crew Commander on or about 16 February 1972 wrongfully go to sleep on duty.

PLEAS: To all Charges and Specifications: Not guilty.

PROOF OF SERVICE

STATE OF ARIZONA)
: ss.
COUNTY OF PIMA)

I, LARRY S. ROSENTHAL, Attorney for LT. FREDERICK JONES, Petitioner, depose and say that on the 12th day of APRIL, 1974, I served three (3) copies of the foregoing Petition for Writ of Certiorari on ROBERT H. BORK, Solicitor General, WILLIAM SAXBE, United States Attorney General; and DAVID V. SEAMAN, Secretary of the Air Force, Respondents herein, by depositing the same in the United States post office mail box, with first class postage prepaid, addresyed to them at their post office addresses.

Larry S. Rosenthal
LARRY S. ROSENTHAL

SUBSCRIBED AND SWORN to before me this 12th day of APRIL, 1974.

Mary Jo Chenoweth
Notary Public

My Commission Expires: 3-5-78

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1562

LT. FREDERICK JONES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, an Air Force officer convicted by court-martial, contends that his punishment—forfeiture of $250 pay per month for six months—is sufficiently restrictive of his liberty so as to place him "in custody" for purposes of federal *habeas corpus*.

After a trial by general court-martial, petitioner—a Second Lieutenant in the United States Air Force—was convicted of failure to do monitor duty, in violation of Articles 92 and 134 of the Uniform Code of Military Justice (10 U.S.C. 892, 934). He was reprimanded and received a fine of $250 per month for six months, to be forfeited from his pay check.[1] After exhausting his military remedies, he sought *habeas corpus* relief under 28 U.S.C.

[1]The sentence was approved and ordered into execution on March 6, 1973.

2241 in the United States District Court for the District of Arizona on the ground that the court-martial proceedings had violated his constitutional rights. The district court dismissed the case for lack of jurisdiction (Pet. App. B), and the court of appeals affirmed (Pet. App. A), holding that "[t]he custody requirement for federal *habeas corpus* relief has not been so far expanded as to encompass the fine imposed upon [petitioner]."

Petitioner contends that even though he has never been incarcerated or physically confined as a result of his offense, the fine imposed against him is enough in itself to satisfy the "custody" requirement of 28 U.S.C. 2241. The courts, however, have uniformly rejected the notion that the imposition of a fine is a "custodial" punishment. See *Westberry* v. *Keith*, 434 F. 2d 623 (C.A. 5); *Hooper* v. *Hartman*, 274 F. 2d 429 (C.A. 9); *Goldstein* v. *Johnson*, 184 F. 2d 342 (C.A. D.C.), certiorari denied, 340 U.S. 879. See also, Cushman, *The "Custody" Requirement for Habeas Corpus*, 50 Mil. L. Rev. 1, 16-17 (1970). Indeed, in *United States* v. *Augenblick*, 393 U.S. 348, in which servicemen convicted by courts-martial brought suits in the Court of Claims for back pay, this Court observed that *habeas corpus* was "not available to [one of the respondents] because he was discharged from the service, not imprisoned" (393 U.S. at 350).[2]

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[2]The cases on which petitioner relies do not support his position. In *Glover* v. *State of North Carolina*, 301 F. Supp. 364 (E.D. N.C.), a *habeas* petition was filed after the challenged sentences had been served, but while the petitioner was incarcerated because of subsequent, unrelated offenses. The court pointed out, *inter alia*, that the convictions which petitioner claimed to be invalid would likely be considered by a parole board in determining when to release petitioner from the then-current imprisonment (301 F. Supp. at 366). *Morgan* v. *Thomas*, 321 F. Supp. 565 (S.D. Miss.), reversed on other grounds, 448 F. 2d 1356 (C.A. 5), certiorari denied, 405 U.S. 920, involved a challenge to a state court order directing that the petitioner be fined and imprisoned until he purged himself of contempt. Shortly after the filing of the petition, he was in fact arrested.

Contrary to petitioner's assertions (Pet. 10-11), there has never been any possibility of incarceration because of default. As the court of appeals observed (Pet. App. A), "[n]o provision of the sentence permits incarceration for nonpayment of the fine." Additionally, nonpayment was impossible because the amount due was automatically forfeited from petitioner's pay checks. Moreover, even if at the time the petition for *habeas corpus* was filed there was some speculative possibility that noncompliance with the court-martial decree might lead to incarceration, *habeas corpus* review would still have been unavailable.[3] See Cushman, *The "Custody" Requirement for Habeas Corpus, supra,* 50 Mil L. Rev. at 16-17; *Hensley* v. *Municipal Court*, 411 U.S. 345, 351-252.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

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[3]For these reasons, petitioner's point (Pet. 8) that the fine was not entirely paid when he first sought *habeas* relief has no significance.